



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF AA-C-S-, INC.

DATE: JUNE 20, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a computer consulting business, seeks to employ the Beneficiary as a programmer analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established its ability to pay the proffered wage from the priority date onward.

On appeal, the Petitioner submits additional evidence and asserts that it has established its ability to pay the proffered wage based on the totality of the circumstances.

Upon *de novo* review, we will withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), from the U.S. Department of Labor (DOL).¹ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the

¹ The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is December 17, 2014. Therefore, the Petitioner must establish that all eligibility requirements for the petition have been satisfied from December 17, 2014, and continuing through the present.

employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

B. Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The proffered wage is \$107,869 per year. The issue is whether the Petitioner has demonstrated its ability to pay the proffered wage as of the December 17, 2014, priority date onward.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.²

In this case, the record reflects that the Petitioner employed and paid the Beneficiary \$63,574.94 in 2014³ and \$63,987.76 in 2015.⁴ The amounts paid by the Petitioner to the Beneficiary do not equal

² Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. See, e.g., *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

³ The Petitioner issued the Beneficiary's IRS Form W-2, Wage and Tax Statement, through a payroll service in 2014.

⁴ The record contains a payroll statement for the Beneficiary for the period ending October 30, 2015, showing year-to-

or exceed the annual proffered wage of \$107,869. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. But we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid the Beneficiary, which is \$44,294.06 in 2014 and \$43,881.24 in 2015.

The Petitioner's federal income tax returns reflect sufficient net income in 2015 to establish its ability to pay. For 2014, however, the tax returns show a net loss and net current liabilities. Therefore, for the year 2014, the Petitioner did not have sufficient net income or net current assets to pay the difference between the annual proffered wage and the wages paid to the Beneficiary.

However, as previously indicated, pursuant to *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. As in *Sonegawa*, we may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In this case, the record indicates that the Petitioner was established in 1997. Its gross receipts increased from \$5,297,490 in 2010 to \$10,941,433 in 2015, and its total salaries and wages paid to employees increased from \$2,079,785 in 2010 to \$3,623,271 in 2015. Thus, the record establishes the Petitioner's long-standing operation, substantial gross receipts, historical growth, and employment of multiple employees.

Additionally, the record contains a letter from the Petitioner's certified public accountants, stating that the Petitioner had an uncharacteristically difficult year in 2014 within a framework of multiple profitable years. The letter notes that the Petitioner was able to pay down a significant portion of its current liabilities reflected in 2014 "due to the new contracts they acquired from product development."

Further, the record establishes the Petitioner's outstanding reputation in its industry, including a significant client list and the Petitioner's receipt of numerous awards and recognitions. Thus, assessing the totality of circumstances in this individual case, the record establishes the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

For the foregoing reasons, the Petitioner established that it had the ability to pay the proffered wage in 2014 and 2015. We will therefore withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

date gross pay from the Petitioner of \$63,987.76.

C. Beneficiary's Experience

Although not addressed by the Director, the record does not establish that the Beneficiary possesses the required experience for the position. As noted, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. In this case, the labor certification states the minimum requirements for the offered position are a master's degree in computer science or information technology plus five years of experience in software development or a related field, or a bachelor's degree computer science or information technology⁵ plus five years of progressive, post-baccalaureate experience in software development or a related field.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1).

The labor certification lists the following experience for the Beneficiary:

- Full-time employment with the Petitioner as an associate consultant from September 6, 2012, to August 22, 2016;
- Full-time employment with [REDACTED] in [REDACTED] Pakistan, as a principal software engineer from June 10, 2009, to September 4, 2012;
- Full-time employment with [REDACTED] in [REDACTED] Pakistan, as a principal software engineer from January 1, 2008, to January 20, 2009; and
- Full-time employment with [REDACTED] in [REDACTED] Pakistan, as a senior software engineer from January 17, 2005, to December 31, 2007.

The record contains the following letters verifying the Beneficiary's experience:

- Letter from [REDACTED] stating that the Beneficiary was an employee from June 10, 2009, to September 4, 2012. It states that he "worked on different projects, most recently as a Principal Software Engineer in our development team." However, the letter does not describe the Beneficiary's duties as required by 8 C.F.R. § 204.5(g)(1), and it does not verify his full-time employment. As such, this letter does not establish the Beneficiary's employment with [REDACTED]
- Letter from [REDACTED] stating that the Beneficiary worked full-time in the [REDACTED] Department from January 1, 2008, to January 20, 2009, and his last title was principal software engineer. The letter specifically describes the Beneficiary's duties. Thus, the letter verifies the Beneficiary's 385 days of qualifying experience.
- Letter from [REDACTED] stating that the Beneficiary was employed from November 17, 2003, to December 31, 2007, first as a software engineer and then as a senior software engineer. However, the letter does not verify his full-time employment, and the dates of employment in

⁵ The Beneficiary received the required foreign equivalent of a U.S. bachelor's degree in computer science on April 9, 2004.

the letter conflict with those listed on the labor certification.⁶ Therefore, this letter is not sufficient to establish the Beneficiary's employment with [REDACTED]

- Letter from [REDACTED] stating that the Beneficiary was employed as a software engineer from March 9, 2002, to November 10, 2004. However, the Beneficiary's employment with [REDACTED] was not listed on the labor certification,⁷ and much of this claimed employment occurred before the Beneficiary received his bachelor's degree. The letter also does not verify his full-time employment. Therefore, the letter is not sufficient verification of the Beneficiary's post-baccalaureate employment with [REDACTED]

Accordingly, the submitted evidence does not establish that the Beneficiary possesses the required five years of progressive, post-baccalaureate experience in software development or a related field. On remand, the Director should determine whether the Beneficiary has the required experience for the proffered position.

II. CONCLUSION

The decision of the Director regarding the Petitioner's ability to pay the proffered wage will be withdrawn. The matter is remanded to the Director for consideration of the Beneficiary's experience. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of AA-C-S-, Inc.*, ID# 326394 (AAO June 20, 2017)

⁶ The Petitioner must resolve this inconsistency with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Even if we accept the letter as evidence of the Beneficiary's experience with [REDACTED] listed on the labor certification (from January 17, 2005, to December 31, 2007), when added to the experience with [REDACTED] it would not be sufficient to meet the five year experience requirement of the labor certification.

⁷ The Beneficiary's experience, without such fact certified by the DOL on the labor certification, lessens the credibility of the evidence and facts asserted. *Matter of Leung*, 16 I&N Dec. 12, 14-15 (Dist. Dir. 1976).